85-389

Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN J. CHAPMAN, *et al.*,
Petitioners,

v.

ROBERT E. LUNA, PH.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

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398

QUESTION PRESENTED

Where a state interprets its equal protection clause as substantively identical to the correlative federal guarantee, may a state court avoid awarding attorney's fees in a civil rights case by labelling its decision that equal protection was denied as resting solely on state law?

LIST OF PARTIES BELOW

1. John J. Chapman
2. Troy H. Elliott
3. N. Altom
4. Robert E. Luna, Ph.D.
5. Ann Hyde
6. Erika Jones
7. Jonathan Samet, Ph.D.
8. Gary Lewis
9. James Montoya
10. Mike Creusere
11. City of Albuquerque
12. County of Bernalillo
12. Hamilton Test Systems, Inc., intervenor in the district court, is not a party to this appeal. On May 21, 1984, pursuant to a stipulation among all parties, the Motion for Attorney's Fees was withdrawn with respect to Hamilton Test Systems

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PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

PRAYER

The Petitioners, John J. Chapman, Troy H. Elliott, and N. Altom, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the New Mexico Supreme Court entered in this proceeding on June 11, 1985.

OPINION BELOW

The Opinion of the New Mexico Supreme Court, not yet reported, appears as Appendix A, attached.

JURISDICTION

The Opinion of the New Mexico Supreme Court was filed on June 11, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871: 42 U.S.C. § 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights Attorney's Fees Awards Act of 1976: 42 U.S.C. § 1988: Appendix C.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE CONSTITUTIONAL PROVISION INVOLVED

New Mexico Constitution, Article 2, § 18:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.

STATEMENT OF THE CASE

In 1979, a motor vehicle emission inspection program (hereafter "Program") was created by joint ordinances of the City of Albuquerque and Bernalillo County. The final set of regulations was filed with the appropriate state agency on December 16, 1982, and the Program was scheduled to go into effect on January 3, 1983. The Petitioners filed an action in state court seeking to halt the operation and enforcement of the Program on the ground, *inter alia*, that the Program violated the Petitioners' right to equal protection under the law. Complaint, Count Six, Appendix D. The pleadings did not specify whether the deprivation was pleaded as a matter of state or federal law because the state and federal equal protection clauses had consistently been interpreted as substantively identical provisions by the state courts.

The district court ordered that the style of the action be recast, and the contractor responsible for implementation of the Program was allowed to intervene. Trial to the court was held on January 24 and 25, 1983.

Evidence was presented to the court on the issues of the Program's conflict with state statutes and its failure to afford equal protection to all similarly situated persons. Memoranda of law were subsequently submitted by the parties on all issues raised in the Complaint and during trial. Petitioners' memorandum argued, *inter alia*, that the City/County ordinances and regulations were not rationally related to the Program's goals; i.e., the effectuation of improved ambient air quality. Petitioners cited decisions of both the New Mexico Supreme Court and this Court in support for their claim of a deprivation of their right to equal protection.

The district court dismissed the Complaint and upheld the constitutionality and validity of the Program. On appeal, the New Mexico Supreme Court affirmed in part and

reversed in part. *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984) (*Chapman v. Luna I*), attached as Appendix B. That court held that the Program's Inspection Fee was impermissible under state law and that the $75 repair provision, which established a maximum required low emission-related repair cost of $75, was not rationally related to any legitimate state end because it allowed the worst pollutors to continue to operate their vehicles. Finding that the provision did not have any reasonable basis since it exempted "certified" pollutors from a pollution control program, the court struck the repair maximum as violative of constitutional guarantees of equal protection. The court did not specify whether it was referring to the federal or state equal protection provisions, although the standard it applied was the federal "rational relation" test. The Opinion of the New Mexico Supreme Court was filed on March 13, 1984.

On April 4, 1984, Petitioners filed a Motion for Attorney's Fees based on 42 U.S.C. § 1988. The district court accepted briefs but did not hear oral argument or hold an evidentiary hearing. On July 2, 1984, the district court filed its Order denying the Motion for Attorney's Fees. On July 20, 1984, Petitioners appealed from this denial. The New Mexico Supreme Court filed its Opinion affirming the denial on June 11, 1985. *Chapman v. Luna II*. That court found that the equal protection issue had been decided as a matter of state law only, precluding application of § 1988.[1]

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[1] Because the New Mexico Supreme Court ruled only on the threshold issue of whether Petitioners were deprived of a federal constitutional right, that court did not reach the additional federal questions raised in this case. On remand, the New Mexico court must determine whether Petitioners were prevailing parties for § 1988 purposes and whether it will exercise its discretion to award attorney's fees under that section.

REASONS FOR GRANTING THE WRIT

I. This Court should take steps to prevent the judicial sleight of hand whereby a plaintiff who prevails on a civil rights claim pursuant to equal protection guarantees is nevertheless deprived of an award of attorney's fees under § 1988.

An important consequence of the federalism principle which unites this country is that the federal courts are not the only repository of federal rights. This Court has specifically recognized that § 1983 claims are appropriately adjudicated in state court. *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980). It is essential to the policy of federalism that this Court has consistently expressed that state courts remain responsive to plaintiffs asserting federal rights. The New Mexico Supreme Court has found a novel method of circumventing the concurrent jurisdiction policy essential to the efficient operation of § 1983. To allow the New Mexico Supreme Court to subvert civil rights claims by denominating them as based only on state law would set a pattern that could be followed by every state which interprets its constitution as providing protection that is coextensive with the guarantees of the Fourteenth Amendment.

In the present case, the New Mexico Supreme Court was selective about its enforcement of federal rights. It refused to allow the Petitioners to be deprived of their civil rights through an ordinance that violated equal protection gauged according to the federal standard, but it then refused to accord Petitioners their Congressionally mandated rights under § 1988. The mechanism which the court employed to defeat the § 1988 claim was the subterfuge of labelling its decision as resting on state grounds only. That label is deceptive because the state equal protection clause provides the same protection as the federal equal protection clause.

For all substantive purposes, the New Mexico equal protection clause has always been interpreted as identical

to the federal equal protection clause. For example, in the face of a challenge based explicitly on both the state constitution and the Fourteenth Amendment, the New Mexico Supreme Court, in *Espanola Housing Authority v. Atencia*, 90 N.M. 787, 568 P.2d 1233 (1977), upheld a state statute as not violative of equal protection. The court applied the same analysis to both the state and the federal equal protection clauses. In *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975), the New Mexico Supreme Court applied the test annunciated by this Court in *McLaughlin v. Florida*, 379 U.S. 184 (1964), to invalidate the New Mexico guest statute as not reasonable in light of its purpose. In *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 399 P.2d 105 (1965), the New Mexico Supreme Court upheld a taxing provision as violative of neither the state nor the federal equal protection clause where the tax was "equal and uniform on all subjects of a class and the classifications for taxation [were] reasonable." 74 N.M. at 777, 399 P.2d at 106.

In *Sena School Bus Co. v. Board of Education*, 101 N.M. 26, 677 P.2d 639 (Ct. App. 1984), the New Mexico Court of Appeals held that "[t]he tests to determine the validity of a statute challenged under the United States and New Mexico equal protection clauses *are the same.*" 101 N.M. at 29, 677 P.2d at 642 (emphasis added). In *Anaconda Co. v. Property Tax Dept.*, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), the same court stated that "[t]he equal protection clauses of the United States and New Mexico Constitutions have been interpreted similarly," 94 N.M. at 210, 608 P.2d at 522, and cited federal as well as state cases in setting forth the basic construction principles. In *Garcia v. Albuquerque Public Schools Board*, 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), the court held that "*[t]he standards for violation of the equal protection clauses of the United States and New Mexico Constitutions are the same.*" 95 N.M. at 393, 622 P.2d at 701 (emphasis added). Therefore,

when the New Mexico Supreme Court found that the Program violated an equal protection standard in New Mexico, by definition it violated both the state *and* federal equal protection standard.

Only in *Chapman v. Luna II*, where attorney's fees are at issue, does it appear that a distinction can be made between state and federal equal protection. But even in *Chapman v. Luna II*, where the Court explicitly stated that the equal protection clauses of the United States Constitution and the New Mexico Constitution "constitute independent rights and protections," Op. at 2, the distinction relates only to the source of the rights and not to any substantive difference between the federal and state protections. Indeed, *Chapman v. Luna II* affirmed the decision in *Chapman v. Luna I*, which had applied the federal rational relation test to strike the ordinance on constitutional grounds.[2]

Whether there is an adequate and independent state ground is a federal question. *Delaware v. Prouse*, 440 U.S. 648 (1978). There, this Court held that its jurisdiction is properly invoked when a state court explicitly bases its decision on parallel state and federal constitutional provisions such that a violation of the federal constitution is necessarily a violation of the state constitution. Because the Delaware Supreme Court's interpretation of its own constitution concededly depended upon its interpretation of the Fourth and Fourteenth Amend-

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[2] The issue presented in this Petition does not arise where a state court has interpreted its own constitution as providing greater protection than the federal constitution and therefore accords relief not available under the federal guarantees. For example, in *People v. Brisendine*, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975), the California Supreme Court held that the California Constitution provided greater protection against unreasonable searches and seizures than that required by the United States Constitution. The court therefore held invalid a search which met the minimum Fourth Amendment requirements as set forth by this Court. Petitioner does not challenge the nonreviewability of *Brisendine*.

ments, this Court granted certiorari and decided the case on the merits. *See also South Dakota v. Neville*, 459 U.S. 553 (1983) (state court decision did not rest on an independent state ground where state court "simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege." 459 U.S. at 556-57, n.5).

In *Prouse* and *Neville*, the state courts reasoned that because there was a violation of the federal constitution, there was also an automatic violation of the state constitution. This Court held that under these circumstances, the state ground was not independent of the federal ground. In the present case, however, the state court found a violation of the state constitution and professed not to address the federal constitutional question, even though it had previously construed the federal and state provisions as substantively identical. Under these circumstances, this Court should also find that the state ground is not independent of the federal constitution.

This case presents the issue left undecided by this Court's recent opinion in *Michigan v. Long*, 463 U.S. 1032 (1983). There, the Court held that in the absence of a plain statement from a state court asserting the independence of the state law ground, the Court would assume that the state law ground is not independent of federal law.

Long, however, did not decide whether the plain statement test is satisfied merely by a state court's conclusory assertion of independence of the state law ground. This Court has never determined when a state ground is independent in the context of a civil rights action. This issue is especially important in civil rights cases because the "adequate and independent state law" rule means that a plaintiff who prevails on state grounds only will not be eligible to receive the award of attorney's fees that would be proper if a violation of the federal constitution were found.

Section 1988 was enacted to assure that potential plaintiffs would not "be deterred from bringing deserving cases to remedy violations of the Constitution," 122 Cong. Rec. 35128 (1976). It is therefore important that this Court instruct those states whose courts have interpreted their constitutions as providing guarantees equivalent to the federal equal protection and due process guarantees that reliance on state grounds which previously have been held to be the substantive equivalent of federal grounds does not constitute an independent state basis and therefore does not preclude an award of attorney's fees under § 1988.[3] To allow the New Mexico Supreme Court decision to stand would be to encourage a pernicious erosion of the rights secured by the Civil Rights Act.

II. If attorney's fees are not available for vindication of civil rights under state constitutions whose protection are coextensive with the United States Constitution, plaintiffs will be forced to forgo state courts and bring all § 1983 cases in federal court. This result will flood the federal courts and defeat the congressional intent that states provide a forum for the bringing of civil rights suits based on the federal constitution.

If a parallel violation of state and federal constitutions does not allow attorney's fees to be awarded to the prevailing plaintiffs, attorneys will file civil rights actions only in federal courts for fear of penurious state courts. This flooding of the federal courts would defeat the congressional intent to allow concurrent jurisdiction and would create an intolerable burden on the federal judicial system.

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[3] A finding that the State ground is independent would raise the issue of whether the State court must reach the § 1983 claim. That issue was not addressed in *Martinez v. California, supra.* Although raised just last term, the issue was not decided because the judgment below was affirmed by an equally divided Court. *Spencer v. South Carolina,* 53 U.S.L.W. 4431 (March 26, 1985).

In recent years, the number of civil rights cases brought in federal courts has increased dramatically. In 1984 alone, 21,219 civil rights cases were filed in United States district courts, an increase of 7.5 percent over the 19,735 cases filed in 1983. Moreover, as of June 30, 1984, there were 1,137 civil rights cases pending for three or more years in the federal district courts. 1984 Annual Report of the Director of the Administrative Office of the United States Courts, 145, 158. Precluding state courts from employing the "independent state grounds" subterfuge as a means of refusing attorney's fees would encourage the use of state courts for the bringing of civil rights actions and would alleviate the burden on the federal system.

CONCLUSION

For the reasons given above, Petitioners respectfully pray that this Honorable Court grant this Application for Writ of Certiorari and that they be given the opportunity to further brief and argue the issues related herein.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 15,553

JOHN J. CHAPMAN, *et al.*,
Plaintiffs-Appellants,
and Cross-Appellees,

vs.

ROBERT E. LUNA, PH.D., *et al.*,
Defendants-Appellees,
and Cross-Appellants,

and

HAMILTON TEST SYSTEMS, INC.,
Intervenor-Appellee.

[Filed June 11, 1985]

Appeal from the District Court of Bernalillo County
Philip R. Ashby, District Judge

Bruce E. Pasternack
Albuquerque, NM — For Appellants

Gary O'Dowd
Albuquerque, NM — For Appellee City of Albuquerque

Hunter Geer
Joe Diaz
Albuquerque, NM — For Appellee County of Bernalillo

Sutin, Thayer & Browne
Charles Brideau
Philip Higdon
Santa Fe, NM — For Hamilton Test Systems

OPINION

FEDERICI, Chief Justice.

Plaintiffs-Appellants (plaintiffs) filed suit in the Bernalillo County District Court seeking a declaratory judgment that the operation and enforcement of the joint Albuquerque/Bernalillo County Motor Vehicle Emission Inspection Program (Program) was unlawful. The district court dismissed the complaint and upheld the Program. Plaintiffs appealed the dismissal to this Court which, in *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984) (*Chapman v. Luna I*), affirmed in part and reversed in part. The mandate issued on March 28, 1984, remanding the cause to the district court. On April 4, 1984, plaintiffs filed in the district court a motion for attorney fees, pursuant to 42 U.S.C. Sections 1983 and 1988 (1982). Plaintiffs now appeal from the district court's denial of the motion. We affirm the district court.

In *Chapman v. Luna I*, plaintiffs were successful in having two aspects of the Program invalidated by this Court. The inspection fee was invalidated on state statutory grounds and the $75.00 repair provision was held to violate "equal protection standards." Plaintiffs now argue that the equal protection allegation was a 42 U.S.C. Section 1983 cause of action and that because they prevailed on this issue, they are entitled to Section 1988 attorney fees. Count six of plaintiffs' complaint contained the equal protection claim. It did not specifically refer to the New Mexico Constitution, the United States Constitution, Section 1983, or Section 1988.

Section 1988 provides in part: "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Plaintiffs' entitlement to Section 1988 attor-

ney fees depends upon whether their original suit was an action under Section 1983.

The statutory prerequisites for a Section 1983 cause of action are "that the defendants must have acted under color of law, regulation, custom or usage of the State of New Mexico, and that the plaintiff must have been deprived of federal constitutional rights, privileges and immunities." *Gomez v. Board of Education*, 85 N.M. 708, 711, 516 P.2d 679, 682 (1973); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir.1963). Plaintiffs' contention that their original lawsuit was a Section 1983 cause of action fails due to their inability to show that deprivation of a federal constitutional right was raised and decided in their favor in *Chapman v. Luna I*.

In *Chapman v. Luna I*, this Court did not specifically refer to either the New Mexico Constitution or the United States Constitution in holding that the $75.00 repair provision violated "equal protection standards." We referred solely to New Mexico case law. Although the equal protection clauses of the United States Constitution and the New Mexico Constitution have been interpreted similarly, *Anaconda Co. v. Property Tax Department*, 94 N.M. 202, 608 P.2d 514 (Ct.App.1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), they nevertheless constitute independent rights and protections.

In an analogous case, the California Supreme Court invalidated a state statute as violating "the basic constitutional guaranty of equal protection of the law. . . ." *Department of Mental Hygiene v. Kirchner*, 60 Cal.2d 716, 717, 36 Cal.Rptr. 488, 388 P.2d 720 (1964). The United States Supreme Court granted certiorari, but then vacated and remanded the case to the California Supreme Court to clarify "whether that court relied on the State Constitution alone, the Federal Constitution alone, or both." *Department of Mental Hygiene v.*

Kirchner, 380 U.S. 194, 198 (1965). On remand the California Supreme Court held that the statute had been invalidated on state constitutional grounds and not by compulsion of the Federal Constitution. *Department of Mental Hygiene v. Kirchner*, 62 Cal.2d 586, 43 Cal.Rptr. 329, 400 P.2d 321 (1965). The Supreme Court of California determined that the state and federal equal protection clauses "provide generally equivalent but independent protections in their respective jurisdictions." 62 Cal.2d at 588, 43 Cal.Rptr. at 330, 400 P.2d at 322.

Similarly, we determine that the $75.00 repair provision was invalidated in *Chapman v. Luna I* solely on New Mexico constitutional grounds. Appellants did not specifically plead a federal equal protection claim or a claim under 42 U.S.C. Section 1983, and this Court did not decide that issue under compulsion of the Federal Constitution.

Chapman v. Luna I, therefore, did not present or decide a federal question. Appellants did not prevail in proving a deprivation of a federal constitutional right, privilege, or immunity. Their cause of action was not a Section 1983 action. The case was brought under the New Mexico Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15, and was decided solely on state statutory and state constitutional grounds. Having failed to prevail in an action to enforce Section 1983, plaintiffs are not entitled to any attorney fees under Section 1988.

On cross-appeal, defendants contend that the district court erred in awarding plaintiffs their appellate costs. We find this question to be moot. The contested costs were paid by Hamilton Test Systems, Inc., who is not a party to this appeal. Furthermore, plaintiffs assert no claim against the City and County for the costs.

The judgment of the district court is affirmed. The cause is remanded for entry of judgment on mandate in conformity with this opinion.

IT IS SO ORDERED.

/s/ William R. Federici
WILLIAM R. FEDERICI
Chief Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Senior Justice

/s/ Harry E. Stowers, Jr.
HARRY E. STOWERS, JR.
Justice

APPENDIX B

SUPREME COURT OF NEW MEXICO

No. 14867

JOHN J. CHAPMAN, TROY H. ELLIOTT and N. ALTOM,
Petitioners-Appellants,

v.

ROBERT E. LUNA, Ph.D., ANN HYDE, ERIKA JONES, JONATHAN SAMET, Ph.D., GARY LEWIS, JAMES MONTOYA and MIKE CREUSERE, as members of the ALB/BERN COUNTY AIR QUALITY CONTROL BOARD, CITY OF ALBUQUERQUE and the BOARD OF COUNTY COMMISSIONERS OF BERNALILLO,
Respondents-Appellees.

March 13, 1984

Bruce E. Pasternack, Michael J. Condon, Albuquerque, for petitioners-appellants.

Gary O'Dowd, City Atty., Barbara W. Stephenson, Asst. City Atty., Albuquerque, Brown, Bain & Bingaman, Philip R. Higdon, Santa Fe, Hunter L. Geer, Joe Diaz, Albuquerque, for respondents-appellees.

OPINION

RIORDAN, Justice.

John J. Chapman, Troy H. Elliott, and N. Altom (Petitioners) filed suit in district court seeking a declaratory judgment that the operation and enforcement of the joint Albuquerque-Bernalillo County Motor Vehicle Emis-

sions Inspection Program (Program) is unlawful. After a non-jury trial, the district court dismissed Petitioners' complaint and entered an order upholding the Program. Petitioners appeal. We affirm in part and reverse in part.

The issues we address [1] are:

I. Whether state law prohibits the City from imposing an inspection fee for the Program.

II. Whether the Program violates equal protection standards by allowing exemptions not based on reasonable distinctions.

III. Whether the Program's criminal penalty provisions are invalid.

IV. Whether the ordinances' severability clauses should be given effect.

In 1979, the Albuquerque City Council (Council) and the Bernalillo County Commission (Commission) enacted ordinances which established prohibitions against excessive air pollutant emissions from motor vehicles in the city of Albuquerque and in Bernalillo County. The ordinances delegated the power to regulate the operation of a vehicle emissions inspection and maintenance program to the Albuquerque-Bernalillo County Air Quality Control Board (Board).

The Board, pursuant to its authority, adopted regulations for the establishment and operation of the Program. The Program requires that all private motor vehicles manufactured in 1968 and thereafter undergo an emissions inspection. Any vehicle failing the initial inspection may obtain a waiver from compliance with Board emission standards if the vehicle receives a prescribed

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[1] The issues we address on appeal are limited and specific. A number of other issues discussed at oral argument, but not raised in the briefs, might effect the validity of the Program. Therefore, this opinion is not to be construed as an approval of the Program.

low-emissions tune-up, or up to $75.00 worth of repairs in attempting to bring the vehicle into compliance ($75.00 Repair Provision). Upon payment of an inspection fee (Inspection Fee), the vehicle owner is given an inspection certificate (Certificate) to be displayed on the vehicle. Violation of any provision of the Program is a misdemeanor punishable by a fine of not more than $300.00 and/or not more than 90 days imprisonment for operating a registered vehicle without a Certificate.

The Program was to go into effect on December 31, 1982. Petitioners filed a petition for writ of mandamus seeking to halt operation and enforcement of the Program on statutory and constitutional grounds. The district court granted a motion for leave to intervene by Hamilton Test Systems, Inc. (Hamilton) on the basis of Hamilton's status as a party to the contract with the City of Albuquerque (City) for design and operation of the Program's test stations. On January 7, 1983, the district court ordered operation and enforcement of the Program ceased until January 17, 1983. The district court subsequently designated the action as a suit for declaratory judgment.

I. Inspection Fee.

Petitioners argue that the imposition of the Inspection Fee constitutes the charging of fees for vehicles subject to registration under the Motor Vehicle Code, NMSA 1978, Sections 66-1-1 to 8-140 (Orig.Pamp. and Cum. Supp.1983), and that Section 66-6-25 prohibits imposition of the Inspection Fee. Section 66-6-25 provides:

> No county or municipality shall require registration or charge *fees* for any vehicle subject to registration under the Motor Vehicle Code * * *. (emphasis added).

The Council, Commission, and Hamilton argue that the Inspection Fee is not a "fee" within the meaning of

Section 66-6-25. They claim that the purpose of Section 66-6-25 is to prohibit cities and counties from using vehicles as a means of raising general revenues and that the Inspection Fee is only for defraying the administrative costs of an environmental program that was specifically delegated to local authorities by the State. They also argue that the Inspection Fee is a valid exercise of local authorities' home rule power. We disagree.

This Court has the duty of construing statutes, if possible, to resolve any apparent conflict. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977). However, where a statute makes sense as written, we will not read language into it which is not there. *Burroughs v. Board of County Commissioners*, 88 N.M. 303, 540 P.2d 233 (1975). Section 66-6-25 states that no city or county shall charge *fees* for motor vehicles. It does not limit cities and counties to the imposition of only certain fees as the Council, Commission and Hamilton argue. Instead, Section 66-6-25 makes clear the legislative intent that cities and counties are prohibited from charging *any* fees for motor vehicles, regardless of the purpose of the fees.

We therefore determine that the imposition of the Inspection Fee is prohibited under Section 66-6-25.

N.M. Const. Art. X, Section 6, the municipal home rule amendment, provides in pertinent part:

> D. A municipality which adopts a charter may exercise all legislative powers and perform all functions *not expressly denied by general law* or charter. (emphasis added).

The major case discussing "municipal home rule" in New Mexico is *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974). The issue in *Apodaca* was whether the City of Albuquerque could increase water and sewer rates and apply the increased revenue to municipal functions other than those set out by statute. The statutes at that time

specifically allowed the City to use water and sewer revenues for "maintaining, enlarging, extending, constructing and repairing' " water and sewer systems. *Id.* at 519, 525 P.2d at 880 (quoting NMSA 1953, Repl.Vol. 3, (1968)), § 14-26-4 and § 14-25-2(A). The statutes did not authorize the revenue to be used for any other purpose nor did it forbid its use for other municipal functions. In ruling in favor of the City, this Court stated:

> The [Municipal Home Rule Amendment] and art. I of the City Charter enable the City, as a municipal corporation, to exercise all legislative powers and to perform all functions *not expressly denied by* the City Charter or *general state law.*

Apodaca, 86 N.M. at 520, 525 P.2d at 880 (emphasis added). This Court defined "general law" as "a law that applies generally throughout the state, or is of statewide concern * * *." *Apodaca*, 86 N.M. at 521, 525 P.2d at 881. This Court also determined that "not expressly denied" means that "some express statement of the authority or power denied must be contained in such general law in order to be applicable * * * or otherwise no limitation exists." *Apodaca*, 86 N.M. at 521-522, 525 P.2d at 881-882.

The law at issue here, Section 66-6-25, applies generally throughout the state and is of statewide concern because the people of the state have an interest in maintaining a uniform system of conditions and charges for operating motor vehicles in the state. Section 66-6-25 is therefore a "general law", and it clearly and expressly states that cities and municipalities are prohibited from charging fees for motor vehicles subject to registration.

Therefore, we also determine that the imposition of the Inspection Fee is not a valid exercise of local authorities' home rule power.

II. Equal Protection.

Petitioners argue that the Program violates equal protection standards because: (1) it exempts from coverage vehicles manufactured before 1968 and all vehicles less than one year old; and (2) the $75.00 Repair Provision is discriminatory in its application.

We have previously determined that:

> Equal protection does not prohibit classification for legislative purposes, provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does and those to whom it does not apply, and that it is so framed as to embrace equally all who may be in like circumstances and situations.

Gruschus v. Bureau of Revenue, 74 N.M. 775, 778, 399 P.2d 105, 107 (1965) (citations omitted). Furthermore, a presumption exists that legislative acts of a municipality are legal and valid, and their provisions are presumed constitutional. *City of Albuquerque v. Jones*, 87 N.M. 486, 535 P.2d 1337 (1975). Since the Program is "legislative in nature", the presumption extends to it. *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 637-638, 459 P.2d 159, 163-164 (Ct.App.1969).

Petitioners first argue that there is no significant difference between 1967 model vehicles and 1968 model vehicles which justifies exempting 1967 model vehicles from the Program. They claim that the fact that pre-1968 motor vehicles were not required by the EPA to have anti-pollution devices installed does not provide a rational basis for the exemption. We disagree.

The record indicates that the pre-1968 model vehicle exemption was decided upon for several reasons. First, the Environmental Protection Agency (EPA) did not require pre-1968 model vehicles to have pollution control devices. Second, EPA recommends that pre-1968 model

vehicles and vehicles more than 15 years old be exempted from emissions inspection maintenance programs that grant age exemptions. The record indicates that such exemptions are granted in Connecticut, Missouri, and Colorado, while other programs exempt an even larger group of vehicles. Third, mechanical differences render pre-1968 vehicles more difficult to test for emission levels than vehicles manufactured in 1968 and thereafter. In addition, the State of New Mexico, pursuant to Section 66-3-844(C), requires that all vehicles manufactured in 1968 and thereafter be "maintained in good working order with the factory-installed devices and equipment * * * designed to prevent, reduce or control exhaust emissions or air pollution." Testimony at trial indicated that pre-1968 model vehicles cannot be measured by state-of-the-art testing equipment and that it is difficult to obtain parts in repairing and tuning-up pre-1968 model vehicles. Testimony at trial also indicated that it would be impossible to bring pre-1968 model vehicles within applicable emission standards without unfairly applying these standards.

After reviewing the record, we determine that the pre-1968 model vehicle exemption does not violate equal protection standards because there are significant differences between 1967 and 1968 model vehicles which provide a rational basis for exempting pre-1968 model vehicles.

Petitioners also argue that the $75.00 Repair Provision is discriminatory in its application. The Program establishes a maximum required low emission-related repair cost of $75.00 for vehicles to qualify for a certificate of waiver. However, the $75.00 Repair Provision does not apply to the cost of replacing or repairing anti-pollution equipment that has been removed or rendered inoperable by any person. Petitioners claim that by requiring the latter group of vehicles to come into compliance, regardless of cost, this exemption denies equal protection to those persons whose anti-pollution devices have

been removed or rendered inoperable through no fault of their own.

It is rational and proper to single out persons who have intentionally removed or rendered inoperable anti-pollution devices. However, the Program allows vehicles whose anti-pollution devices that do not function properly or have been rendered inoperable or removed by another means to undergo no more than $75.00 worth of repairs even if those repairs do not bring the vehicle into compliance. The Federal Government has required all vehicles manufactured in a current year to meet certain emission standards. 42 U.S.C. § 7521(a) (Supp.V.1981). It is a violation of Federal law to remove or render inoperable the manufacturer's anti-pollution devices. 42 U.S.C. § 7522(a)(3)(A) (Supp.V.1981). In our opinion, it is not unfair or unreasonable to single out this group of violators and require them to spend whatever it takes to bring their vehicles into compliance. Nor is it unreasonable to exempt new cars from testing since Federal law requires that they meet the federal standards when manufactured. 42 U.S.C. § 7521(a) (Supp.V.1981).

This does not, however, address the real issue involving the $75.00 exemption. The Program, through testing, identifies vehicles that pollute. However, by paying up to $75.00 to a private individual, a mechanic, it allows the violators who are in effect "certified" as the worst pollutors to continue to operate their vehicles. This is not rational. It does not have any reasonable basis, nor is it designed to further the objectives of cleaning up the air. Allowing cars that fail the test to undergo no more than $75.00 worth of repairs, violates the Program's stated purpose which is to protect the health and welfare of the citizenry by reducing pollutant levels. If the Program is to operate fairly and pursue its stated purpose, then it is essential that all vehicles tested and proved to be operating below the Program's emission standards be required to undergo sufficient repairs to bring them into compliance regardless of the expense involved.

We therefore determine that the $75.00 Repair Provision is invalid.

III. *Criminal Penalties.*

Petitioners also argue that the Program is invalid because it imposes a criminal penalty in violation of state law. Article X, Section 6 provides in pertinent part:

> E. The purpose of this section is to provide for maximum local self-government. *A liberal construction shall be given* to the powers of municipalities. (emphasis added).

In reviewing city legislation, we consider that:

> [A] home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act. *To adopt any other interpretation in New Mexico would make the home rule amendment meaningless.*

Apodaca, 86 N.M. at 521, 525 P.2d at 881 (emphasis added).

In determining the authority of the Council to enact its ordinance, including its penalties, we must look at the applicable legislative enactment, the state Air Quality Control Act, NMSA 1978, Section 74-2-1 to Section 74-2-17 (Repl.Pamp.1983). Section 74-2-3(A) grants the Environmental Improvement board enforcement authority except in "municipalities within A class counties or A class counties which have elected, by adopting the appropriate ordinance, to assume jurisdiction for the administration and enforcement of the Air Quality Control Act." [2]

The Act specifically provides in Section 74-2-4(A) that:

---

[2] An "A class county" is defined by NMSA 1978, Section 4-44-1 (Repl.Pamp. 1980) as counties "having a final, full assessed valuation of over seventy-five million dollars ($75,000,000) and having a population of one hundred thousand persons or more as determined by the last official United States census[.]"

> A class counties and any municipality wthin an A class county which provides for air quality control *shall*, by ordinance, provide for the local administration and enforcement of the Air Quality Control Act * * *. The provision of any such ordinance *shall be consistent* with the *substantive provisions* of the Air Quality Control Act * * *. (emphasis added).

The enforcement under the Act is civil in nature with two exceptions which are contained in Section 74-2-14. Section 74-2-14 provides in pertinent part:

> A. [A]ny A class county or municipality within an A class county *may* prescribe penalties for violations of an ordinance:
>
> * * * *
>
> (2) prohibiting the removal of motor vehicle emission control devices installed as required by law and *requiring the maintenance of* [*motor vehicle emission control*] *devices in operating condition.*
>
> B. [I]t *shall* be a petty misdemeanor to violate any regulation of the environmental improvement board:
>
> * * * *
>
> (2) prohibiting the removal of motor vehicle emission control devices installed as required by law or *requiring the maintenance of* [*motor vehicle emission control*] *devices in operating condition.* (emphasis added).

The question becomes whether the Act, which under *Apodaca* is a "general state law", in any way "expressly denies" the City the authority to provide for criminal sanctions.

Our reading of *Apodaca* leads to the inescapable conclusion that not only is there no express denial of that authority, but the Legislature specifically authorized it in Section 74-2-14. The fact that the Legislature provided

additional civil penalties and prescribed the penalty for violation of board *regulations* does not eliminate that authority.

We therefore determine that the criminal penalty provisions of the Program are not invalid.

IV. *Severability Clause.*

Having determined that at least two provisions of the ordinances are invalid, we address the effect of our decision. The ordinances have the following severability clause:

> If any section, subsection, sentence, clause, word or phrase of this ordinance is for any reason held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

We have previously addressed the effect of the inclusion of a severability clause in an ordinance. In *Schwartz v. Town of Gallup*, 22 N.M. 521, 529, 165 P. 345, 348 (1917) we stated:

> A part of the law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other without impairing the force and effect of the portion which remains, and where the legislative purpose as expressed in such valid portion can be accomplished and given effect, independently of the void provisions, and where if the entire act is taken into consideration it cannot be said that the enacting power would not have passed the portion retained had it known that the void provisions must fall. (citation omitted).

We have determined that a severability clause raises a presumption that the legislating body would have enacted the rest of the ordinance without the void section. *Barber's Super Markets v. City of Grants*, 80 N.M. 533, 458

P.2d 785 (1969). The severability clause in this case is emphatic in its statement that the ordinances would have been enacted even if the invalid provisions were not included.

We therefore determine that the invalid provisions do not invalidate the ordinances.

V. *Conclusion.*

We are aware of the tremendous problem the government faces in trying to alleviate air pollution, some of which can be attributed to motor vehicle emissions. We are also aware of the difficulty involved in developing a program that meets the objective of clean air while complying with statutory and constitutional limitations. However, it is not for the courts to develop such a program, but rather it is the responsibility of the Legislature, the City, and the County to do so.

We conclude that the Program may be continued without imposition of a fee and without a repair cap for vehicles that do not come into compliance; otherwise, the Council and Commission will have to discontinue the Program.

IT IS SO ORDERED.

SOSA, Senior Justice, specially concurring.

FEDERICI, C.J., and STOWERS and WALTERS, JJ., concurring in part and dissenting in part.

SOSA, Senior Justice, specially concurring.

I concur with the four points in this opinion. However, under Point II, I would address the equal protection issue that was raised in oral argument, but not presented in the briefs. Specifically, the question of whether the program should be applied to all state residents or merely to residents of Bernalillo County is one that I believe merits attention. In *Wylie Brothers Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board*, 80 N.M. 633, 459 P.2d 159 (Ct.App.1969), an opinion dealing with air pollution regulations, Justice Oman anticipated the problems we would encounter if regulations and controls were only local and not statewide. There he prophetically stated:

> To draft, and particularly to enforce, regulations for the control of emissions from these highly mobile vehicles on a single county-wide basis, would be extremely difficult. *The making of regulations relative to the control of emissions from these vehicles belongs to an agency with far greater geographic jurisdiction than that of a single county.* The control thereof should be left very largely, if not entirely, to the state and federal governments. (emphasis added).

Id. at 644, 459 P.2d at 170.

This is an issue of significant importance and general public nature affecting the interest of the state at large and, as such, this Court may consider it. *DesGeorges v. Grainger*, 76 N.M. 52, 412 P.2d (1966). All citizens, not only those in Bernalillo County, should be afforded protection against air pollutants. A statewide program against vehicular pollution would equally regulate all vehicles in the state and remove the inequities in the program. As presently enforced, the pollution control pro-

gram subjects only residents of Bernalillo County to the Inspection Program. The greater Albuquerque metropolitan area covers other counties. Citizens of these outside counties use Bernalillo County roads daily yet are not subject to the Inspection Program. This appears to me to be an arbitrary, unfair and selective imposition of a regulation on Bernalillo County residents.

It is my reading of Section 66-6-25, NMSA 1978, of the Motor Vehicle Code, that the statute directly prohibits the charging of any fees in connection with the operation of motor vehicles, no matter how noble the purpose. As a matter of public policy and with deep concern for the health and welfare of New Mexico citizens, I agree with the need for an effective program to prevent increased air pollution. However, it is not within the province of the judiciary to change Section 66-6-25. The legislature must remedy this defect.

FEDERICI, Chief Justice and WALTERS, Justice (concurring in part, dissenting in part).

We concur in Justice Riordan's disposition of Points II, III, and IV. We disagree with the decision regarding Point I since Section 66-6-25, NMSA 1978, refers to proscription of fees for "registration" of vehicles by a county or municipality, and not to fees for other purposes. We therefore respectfully dissent on that issue.

STOWERS, Justice (concurring in part, dissenting in part).

I concur in the disposition of points I, II, and IV of the opinion. I dissent as to point III, in that the imposition of criminal penalties exceeds the legislative authority which is limited to civil sanctions and fines.

APPENDIX C

42 U.S.C.

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX D

COMPLAINT

* * * *

COUNT SIX

(Equal Protection)

31. Petitioners re-allege paragraphs 1 through 30 in full.

32. The City Ordinance, County Ordinance and Regulations deprive Petitioners of equal protection under the law in that:

A. Motor vehicles manufactured before the 1967 model year are unreasonably exempted notwithstanding the fact that such vehicles contribute to hydrocarbon and carbon monoxide air pollution in the City and County;

B. Motor vehicles which are tested and fail are unreasonably exempted if they can be shown to pollute the air so badly that it would cost more than $75.00 to fix them; and,

C. Motor vehicles manufactured from the 1967 model year through the 1982 model year unreasonably, artificially and arbitrarily, and without natural basis, are not exempted and must comply as a result of which owners of such motor vehicles would bear the entire burden of paying for and complying with the City Ordinance, County Ordinance and Regulations notwithstanding the fact that such persons are not fully responsible for hydrocarbon and carbon monoxide air pollution from motor vehicle emissions.

33. To the extent the City Ordinance, County Ordinance and Regulations impose and create a denial of equal protection under the law to citizens of the City and County, they are unlawful and should not be enforced.

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN J. CHAPMAN, *et al.*,
Petitioners,

v.

ROBERT E. LUNA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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QUESTION PRESENTED

Whether or not, as a condition precedent to a request for an award of reasonable attorney's fees pursuant to 42 U.S.C. § 1988, Petitioners were prevailing parties in any action or proceeding to enforce a provision of 42 U.S.C. § 1983?

LIST OF ALL PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Petitioners, Plaintiffs in the New Mexico state court proceeding, are John J. Chapman, Troy H. Elliott and N. Altom. The Respondents are Robert L. Luna, Ph.D., Ann Hyde, Erika Jones, Jonathan Samet, Ph.D., Gary Lewis, James Montoya, Mike Creusere, the City of Albuquerque, New Mexico, and the Board of County Commissioners of Bernalillo County, New Mexico.

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

---

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico, a copy of which is attached as Appendix A, has been reported. *Chapman v. Luna*, 701 P.2d 367 (N.M. 1985).

STATUTES INVOLVED

Civil Action for Deprivation of Rights: 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Proceedings in Vindication of Civil Rights; Attorney's Fees: 42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This action was commenced in the District Court for the County of Bernalillo, State of New Mexico, on January 2, 1983 by the filing of a Petition for Writ of Mandamus by the Petitioners. (App. B). By order of the court entered January 14, 1983, the Petition for Writ of Mandamus was "recast" as a complaint for declaratory judgment. (App. C). As amended, the petition (complaint) sought a judgment declaring that the Motor Vehicle Emissions Control Ordinances of both the City of Albuquerque and the County of Bernalillo, New Mexico were contrary to various New Mexico statutes, certain common law principles and the Constitution of both the United States and the State of New Mexico.

The petition (complaint) for declaratory judgment was set forth in seven separate counts. (App. B). Prior to trial, the Plaintiffs abandoned Count Two and, on February 8, 1983, the District Court entered an order dismissing the remaining counts. (App. D). On appeal, the New Mexico Supreme Court affirmed in part and reversed in part. *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984). (App. E). The court found in favor of Petitioners on that portion of Count Six of the Complaint contained in Paragraph 32(b). (App. B, p. 12). The court held that the provision allowing certain vehicles to come into compliance by obtaining a maximum of $75.00 in repairs was not rational, did not have a reasonable basis and was therefore invalid. (App. E, pp. 11-14).

After remand to the District Court, Petitioners moved for an order awarding them attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988. (App. F). On July 2, 1984 the District Court entered a declaratory judgment in conformity with the opinion of the Supreme Court of New Mexico and denied the motion for the award of attorney's fees. (App. G). The Order was upheld by the Supreme Court of the State of New Mexico on June 11,

1985. *Chapman v. Luna*, 701 P.2d 367 (N.M. 1985). (App. A).

SUMMARY OF THE ARGUMENT

The Petitioners made no claim that any of them had been injured by reason of a deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States. Petitioners made no conclusory allegation in their complaint that they based any claims on 42 U.S.C. § 1983. The New Mexico Supreme Court did not find that the Petitioners were entitled to a judgment for injuries resulting from a deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States. The New Mexico Supreme Court did not find that the Petitioners were entitled to judgment pursuant to 42 U.S.C. § 1983. The Petitioners did not prevail in any action or proceeding to enforce a provision of 42 U.S.C. § 1983. The Petitioners did not allege any rights under 42 U.S.C. § 1983 until their action had been remanded for entry of judgment consistent with the decision of the New Mexico Supreme Court. Petitioners are not entitled to attorney's fees pursuant to 42 U.S.C. § 1988.

ARGUMENT

PETITIONERS WERE NOT PREVAILING PARTIES IN ANY ACTION OR PROCEEDING TO ENFORCE A PROVISION OF 42 U.S.C. § 1983 AND WERE PROPERLY DENIED ATTORNEY'S FEES AS A PART OF THEIR COSTS

A. The Petitioners' original petition for Writ of Mandamus, recast as a complaint for declaratory judgment, does not allege any deprivation of rights under 42 U.S.C. § 1983.

Petitioners assert that they were deprived of attorney's fees by a subsequent narrow construction of the holding in favor of Petitioners on the merits of the action. Pe-

titioners would have this Court believe that the Supreme Court of New Mexico evaded the real issue on whether or not Petitioners were entitled to attorney's fees, by holding that Petitioners had prevailed on the merits only pursuant to the Equal Protection Clause of the Constitution of the State of New Mexico. In fact, the New Mexico Supreme Court specifically found that Petitioners did not specifically plead a federal equal protection claim "or a claim under 42 U.S.C. Section 1983." *Chapman v. Luna*, 701 P.2d at 369. (App. A, p. 4).

As the Court will see from examination of Petitioners' original pleading in the District Court (App. B), the Petitioners did not allege an injury based upon a deprivation of their civil rights. None of the Petitioners sought any personal relief, in the form of damages or equitable relief, against the Respondents. Their original pleading sought only a mandatory injunction, prohibiting the Respondents from enforcing the ordinances as a general proposition. (App. B, p. 14).

In Count Six, Petitioners claim that the ordinances and regulations deprived them "of equal protection under the law" because "motor vehicles which are tested and fail are unreasonably exempted if they can be shown to pollute the air so badly that it would cost more than $75.00 to fix them . . . ." (App. D, p. 12). Count Six makes no claim that any of the Petitioners were specifically injured because the City and County Ordinances would exempt a motor vehicle from full compliance with the air pollution laws if the vehicle obtained a maximum of $75.00 in repairs.

A claimant under Section 1983, whether seeking injunctive relief or damages, must allege specific concrete facts demonstrating that the challenged practices of the person acting under color of state law actually harmed the claimant. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). It is not sufficient, for the purposes of pleading under 42 U.S.C. § 1983, that the plaintiff merely allege that the public officials have failed to meet constitutional stand-

ards. The complaint must allege that the plaintiff himself was injured by the conduct of the public officials. *Gardner v. Luckey*, 500 F.2d 712, 714 (5th Cir. 1974), *cert. denied*, 423 U.S. 841 (1975).

The New Mexico Supreme Court, consistent with this Court's decisions, noted that the Petitioners did not specifically plead a federal equal protection claim. (App. A, p. 4). This Court has indicated that a claimant under 42 U.S.C. § 1983 "must allege that some person has deprived him of a federal right . . . ." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Paragraph 32 of the Complaint makes no mention of the United States Constitution but only claims that the ordinances and regulations "deprive Petitioners of equal protection under the law . . . ." (App. B, p. 12). A comparison of Count 6 with Count 3 indicates that Petitioners knew how to allege a deprivation of a federal right. In Count 3 they claimed that they were deprived of the freedom to contract, "a right protected by the United States Constitution." (App. B, p. 8).

B. The New Mexico Supreme Court did not find that the Respondents had been injured by a deprivation of any right, privilege or immunity secured by the Constitution and laws of the United States.

The New Mexico Supreme Court, in its decision on the merits, held that the applicable provision of the ordinances is "not rational . . . does not have any reasonable basis, nor is it designed to further the objectives of cleaning up the air . . . ." (App. E, p. 13). The Court also determined that the $75.00 repair provision "is invalid." (App. E, p. 14). Although the opinion on the merits reads more like an interpretation of legislative intent, it is arguable that the court found that the ordinances violated "equal protection standards." (App. A, p. 2).

Absent from the findings declaring a portion of the ordinances invalid is a finding that these Petitioners were

specifically denied the equal protection of the laws. The Court's declaration that the ordinances violate "equal protection standards" (App. A, p. 2; App. E, p. 11), is consistent with the tendency of New Mexico courts to issue declaratory judgments on constitutional issues without requiring a specific injury or exhaustion of administrative remedies. *See generally* Browde, Survey of New Mexico Administrative Law, 12 N.M.L.Rev. 1, 85 (1982). *See, e.g., Nall v. Baca*, 95 N.M. 783, 626 P.2d 1280 (1980) where the court affirmed a declaratory judgment upholding the constitutionality of a state statute prohibiting nude dancing in a licensed liquor establishment, without requiring the plaintiff to exhaust administrative remedies. In effect, the New Mexico Supreme Court takes an expansive view of its duty to protect the public by issuing declaratory judgments on statutes and ordinances when the statute or ordinance is in violation of a constitutional provision.

C. Petitioners did not specifically claim that their action was brought pursuant to 42 U.S.C. § 1983 until after they had prevailed on some other ground.

The first mention by Petitioners of any claim pursuant to 42 U.S.C. § 1983 is in their motion for attorney's fees filed after remand to the District Court. (App. F). Petitioners claim that they had sought relief under 42 U.S.C. § 1983 was an after-thought, based entirely on their desire to obtain attorney's fees as a part of their costs of bringing the mandamus/declaratory judgment action. Having not made a specific claim, nor having prevailed, under 42 U.S.C. § 1983, the Petitioners are not entitled to seek attorney's fees under 42 U.S.C. § 1988 in what amounts to a collateral proceeding. *Cf., Estes v. Tuscaloosa County*, 696 F.2d 898, 901 (11th Cir. 1983) (independent action for attorney's fees) and *Webb v. Board of Education*, 105 S.Ct. 1923 (1985) (attorney's fees may not be awarded in § 1983 action for work done in prior administartive hearing).

D. The Petitioners are not entitled to attorney's fees as a part of their costs.

Having failed to allege any claim under 42 U.S.C. § 1983 and having prevailed in the New Mexico Supreme Court on some constitutional ground, but without establishing that any of the Petitioners sustained a deprivation of any right, privilege or immunity secured to them by the Constitution and laws of the United States, these Petitioners sought attorney's fees as an after-thought. "The plain language of section 1988 is unambiguous." *Russo v. State of New York*, 672 F.2d 1014, 1022 (2d Cir. 1982). "Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an 'action or proceeding to enforce [§ 1983]'." *Webb v. Board of Education, supra*, 105 S.Ct. at 1928. These Petitioners did not institute any action or proceeding to enforce a provision of § 1983 and therefore could not have prevailed within the meaning of 42 U.S.C. § 1988.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondents

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 15,553

JOHN J. CHAPMAN, *et al.*,
Plaintiffs-Appellants,
and Cross-Appellees,

vs.

ROBERT E. LUNA, PH.D., *et al.*,
Defendants-Appellees,
and Cross-Appellants,

and

HAMILTON TEST SYSTEMS, INC.,
Intervenor-Appellee.

[Filed June 11, 1985]

Appeal from the District Court of Bernalillo County
Philip R. Ashby, District Judge

Bruce E. Pasternack
Albuquerque, NM — For Appellants

Gary O'Dowd
Charles Brideau
Albuquerque, NM — For Appellee City of Albuquerque

Hunter Geer
Joe Diaz
Albuquerque, NM — For Appellee County of Bernalillo

Sutin, Thayer & Browne
Philip Higdon
Santa Fe, NM — For Hamilton Test Systems

OPINION

FEDERICI, Chief Justice.

Plaintiffs-Appellants (plaintiffs) filed suit in the Bernalillo County District Court seeking a declaratory judgment that the operation and enforcement of the joint Albuquerque/Bernalillo County Motor Vehicle Emission Inspection Program (Program) was unlawful. The district court dismissed the complaint and upheld the Program. Plaintiffs appealed the dismissal to this Court which, in *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984) (*Chapman v. Luna I*), affirmed in part and reversed in part. The mandate issued on March 28, 1984, remanding the cause to the district court. On April 4, 1984, plaintiffs filed in the district court a motion for attorney fees, pursuant to 42 U.S.C. Sections 1983 and 1988 (1982). Plaintiffs now appeal from the district court's denial of the motion. We affirm the district court.

In *Chapman v. Luna I*, plaintiffs were successful in having two aspects of the Program invalidated by this Court. The inspection fee was invalidated on state statutory grounds and the $75.00 repair provision was held to violate "equal protection standards." Plaintiffs now argue that the equal protection allegation was a 42 U.S.C. Section 1983 cause of action and that because they prevailed on this issue, they are entitled to Section 1988 attorney fees. Count six of plaintiffs' complaint contained the equal protection claim. It did not specifically refer to the New Mexico Constitution, the United States Constitution, Section 1983, or Section 1988.

Section 1988 provides in part: "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Plaintiffs' entitlement to Section 1988 attor-

ney fees depends upon whether their original suit was an action under Section 1983.

The statutory prerequisites for a Section 1983 cause of action are "that the defendants must have acted under color of law, regulation, custom or usage of the State of New Mexico, and that the plaintiff must have been deprived of federal constitutional rights, privileges and immunities." *Gomez v. Board of Education*, 85 N.M. 708, 711, 516 P.2d 679, 682 (1973); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir.1963). Plaintiffs' contention that their original lawsuit was a Section 1983 cause of action fails due to their inability to show that deprivation of a federal constitutional right was raised and decided in their favor in *Chapman v. Luna I.*

In *Chapman v. Luna I*, this Court did not specifically refer to either the New Mexico Constitution or the United States Constitution in holding that the $75.00 repair provision violated "equal protection standards." We referred solely to New Mexico case law. Although the equal protection clauses of the United States Constitution and the New Mexico Constitution have been interpreted similarly, *Anaconda Co. v. Property Tax Department*, 94 N.M. 202, 608 P.2d 514 (Ct.App.1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), they nevertheless constitute independent rights and protections.

In an analogous case, the California Supreme Court invalidated a state statute as violating "the basic constitutional guaranty of equal protection of the law. . . ." *Department of Mental Hygiene v. Kirchner*, 60 Cal.2d 716, 717, 36 Cal.Rptr. 488, 388 P.2d 720 (1964). The United States Supreme Court granted certiorari, but then vacated and remanded the case to the California Supreme Court to clarify "whether that court relied on the State Constitution alone, the Federal Constitution alone, or both." *Department of Mental Hygiene v.*

Kirchner, 380 U.S. 194, 198 (1965). On remand the California Supreme Court held that the statute had been invalidated on state constitutional grounds and not by compulsion of the Federal Constitution. *Department of Mental Hygiene v. Kirchner*, 62 Cal.2d 586, 43 Cal.Rptr. 329, 400 P.2d 321 (1965). The Supreme Court of California determined that the state and federal equal protection clauses "provide generally equivalent but independent protections in their respective jurisdictions." 62 Cal.2d at 588, 43 Cal.Rptr. at 330, 400 P.2d at 322.

Similarly, we determine that the $75.00 repair provision was invalidated in *Chapman v. Luna I* solely on New Mexico constitutional grounds. Appellants did not specifically plead a federal equal protection claim or a claim under 42 U.S.C. Section 1983, and this Court did not decide that issue under compulsion of the Federal Constitution.

Chapman v. Luna I, therefore, did not present or decide a federal question. Appellants did not prevail in proving a deprivation of a federal constitutional right, privilege, or immunity. Their cause of action was not a Section 1983 action. The case was brought under the New Mexico Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15, and was decided solely on state statutory and state constitutional grounds. Having failed to prevail in an action to enforce Section 1983, plaintiffs are not entitled to any attorney fees under Section 1988.

On cross-appeal, defendants contend that the district court erred in awarding plaintiffs their appellate costs. We find this question to be moot. The contested costs were paid by Hamilton Test Systems, Inc., who is not a party to this appeal. Furthermore, plaintiffs assert no claim against the City and County for the costs.

The judgment of the district court is affirmed. The cause is remanded for entry of judgment on mandate in conformity with this opinion.

IT IS SO ORDERED.

/s/ William R. Federici
WILLIAM R. FEDERICI
Chief Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Senior Justice

/s/ Harry E. Stowers, Jr.
HARRY E. STOWERS, JR.
Justice

APPENDIX B

STATE OF NEW MEXICO
IN THE DISTRICT COURT
COUNTY OF BERNALILLO

No. CV-83-00001

JOHN J. CHAPMAN, TROY H. ELLIOTT and N. ALTOM,
Petitioners,

vs.

ROBERT E. LUNA, Ph.D., ANN HYDE, ERIKA JONES, JONATHAN SAMET, Ph.D., GARY LEWIS, JAMES MONTOYA and MIKE CREUSERE, as members of the Albuquerque/Bernalillo County Air Quality Control Board, the CITY OF ALBUQUERQUE, an incorporated municipality, and the COUNTY OF BERNALILLO, a political subdivision of the State of New Mexico,

Respondents.

PETITION FOR WRIT OF MANDAMUS

PETITIONERS John J. Chapman, Troy H. Elliott and N. Altom, by and through their attorney, Bruce E. Pasternack, P.C., state for their Petition for Writ of Mandamus:

1. Petitioners are residents of Albuquerque, Bernalillo County, New Mexico, and owners of motor vehicles having a model year after 1967 and before 1983. As such, Petitioners are subject to enforcement of the following ordinances and regulations scheduled to take effect January 3, 1983:

A. City of Albuquerque Motor Vehicle Emissions Control Ordinance, § 6-4-1 et seq., 1974 Revised Or-

dinance Book, a certified copy of which is attached herewith as Exhibit A (hereafter "City Ordinance");

B. Bernalillo County Motor Vehicle Emissions Control Ordinance, No. 81-31, a certified copy of which is attached herewith as Exhibit B (hereafter "County Ordinance"); and,

C. Albuquerque/Bernalillo County Air Quality Control Board Motor Vehicle Inspection Regulation No. 28, a certified copy of which is attached herewith is attached herewith as Exhibit C (hereafter "Regulations").

Petitioner Chapman is in direct and immediate danger of having the City Ordinance, County Ordinance and Regulations enforced against him as is evidenced by the Inspection/Maintenance Program Notice (hereafter "Notice"), a copy of which is attached herewith as Exhibit D.

2. Respondents Robert E. Luna, Ph.D., Ann Hyde, Erika Jones, Jonathan Samet, Ph.D., Gary Lewis, James Montoya and Mike Creusere are the duly appointed, qualified and acting members of the Albuquerque/Bernalillo County Air Quality Control Board (hereafter Board"), a joint board established by an A class county responsible for the administration and enforcement of the provisions of the New Mexico Air Quality Control Act, § 74-2-1 et seq., N.M.S.A. 1978 (hereafter "Air Act"), and functioning pursuant to the Air Act. Respondent City of Albuquerque (hereafter "City") is an incorporated municipality operating as a political subdivision of the State of New Mexico. Respondent County of Bernalillo (hereafter "County") is a political subdivision of the State of New Mexico. In addition to being governed by the Air Act, the Board is created by and governed by the City of Albuquerque Air Quality Control Board Ordinance, § 6-16-1 et seq., 1974 Revised Ordinance Book, a certified copy of which is attached herewith as Exhibit E (hereafter "Board Ordinance").

3. Pursuant to the City Ordinance and County Ordinance, Albuquerque and Bernalillo County have enacted an automobile inspection program (hereafter "Program") with the purported purpose of reducing hydrocarbon and carbon monoxide pollution caused by certain motor vehicles in the City and County. The Regulations were called for by the City Ordinance and County Ordinance, and as a result were promulgated and adopted by the Board. The Regulations were filed of record with the State Records Center on December 16, 1982, at 3:06 p.m. and 3:07 p.m. The Regulations were created to effectuate the Program.

4. The Program purports to operate in the following manner:

1. The City and the County contract with a private firm—in this case, the Hamilton Testing Systems division of United Technologies (hereafter "UT") to construct testing facilities pursuant to the specifications set forth in a Request for Proposals which is in the Respondents' possession.

2. Citizens of the City and County are required to bring their automobiles to the facilities, pay in cash a $9.25 per vehicle charge for testing of their vehicles, and are given a sticker signifying that their vehicles passed if their emissions are within certain guidelines.

3. Vehicles which fail the test are re-tested after receiving repairs provided that vehicles receiving over $75.00 in repairs will receive a sticker indicating compliance with the guidelines even if they do not comply with the guidelines and emit hydrocarbons and carbon monoxide in excess of the guidelines.

4. A variety of other motor vehicles need not comply with the City Ordinance and County Ordinance by virtue of the Regulations, including:

A. Motor vehicles manufactured during or before the 1967 model year;

B. New motor vehicles registered for the first time; and,

C. Motor vehicles in categories receiving variances such as motor vehicles on new and used car lots and other categories of motor vehicles exempted by the Regulations or by variance.

5. The $9.25 per vehicle fee must be paid in cash. Approximately $6.18 per vehicle will be retained by UT. The balance will be paid to the City and County, $.93 per vehicle to be used to administer the Program and the remainder to be paid back to UT annually to pay for the difference between the number of motor vehicles actually tested annually and the number of vehicles the City and County have guaranteed UT would annually be tested (i.e. 328,444 motor vehicles in 1983).

6. Persons choosing not to participate in the Program are subject to 90 days in jail and a $300.00 fine.

5. The program is scheduled to begin January 3, 1983, with mandatory inspections and the above-referenced criminal sanctions to begin that date.

COUNT ONE

(State Rules Act)

6. Petitioners re-allege paragraphs 1 through 5 in full.

7. Pursuant to the Air Act and the Board Ordinance, no regulations enacted by the Board can take effect until thirty (30) days after their filing with the State Records Center.

8. As is evidenced by Exhibit C, the Regulations were not so filed until December 16, 1982, at 3:06 p.m. and

3:07 p.m. Therefore, they cannot take effect until January 17, 1983.

9. The Regulations give effect to and begin operation of the Program. The City and County have announced, pursuant to Exhibit D, and thousands of Notices like it, their intention to begin enforcing the Regulations and operating the Program on January 3, 1983. Petitioners are informed and believe that from 25,000 to 35,000 residents of the County have received forms substantially identical to the Notice, and will face the threat of criminal liability if they do not participate in the Program.

10. Based on the foregoing, the Regulations are not lawfully in force, and will not be lawfully in force until January 17, 1983. Any attempt to enforce the Regulations, or to operate the Program which is effectuated by the Regulations, before January 17, 1983, will be unlawful. The Board, the City and County have therefore given notice of their intention to engage in unlawful conduct.

WHEREFORE, on Count One Petitioners pray that a Writ of Mandamus issue to and against the Respondents herein enjoining them from enforcing the City Ordinance, County Ordinance and Regulations until January 17, 1983, and from initiating any Program, collecting any monies or imposing any penalty effectuated thereby until January 17, 1983, unless the Alternative Writ is converted to a Peremptory Writ on other grounds in which case then permanently, for Petitioners' attorney's fees and costs herein, and for such other relief as the Court deems proper.

COUNT TWO

(Unenforceable as invalid exercise of police power or unreasonable, arbitrary and capricious)

11. Petitioners re-alleged paragraphs 1 through 10 in full.

12. The Program is designed to annually inspect 328,444 motor vehicles at two (2) inspection stations each having four (4) inspection bays. The City and County have guaranteed UT that it will be paid for inspecting 328,444 motor vehicles in 1983. This does not count vehicles which fail the inspection at first and must be re-inspected.

13. Each per vehicle inspection is reported by the City, County and UT to take approximately five (5) minutes.

14. It is mathematically impossible for the number of motor vehicles the Program is designed to inspect to be inspected in one (1) calendar year during UT's announced hours of operation. In fact, not even the actual number of 1967 and later model year motor vehicles registered in Bernalillo County and not otherwise exempt from the City Ordinance, County Ordinance and Regulations can be inspected in that time period.

15. Therefore, persons wishing to comply with these laws will be prevented by the very nature of these laws from complying, and will, therefore, face criminal liability.

16. Subjecting the citizens of this City and County to criminal liability where the laws cannot be complied with is an invalid exercise of the police power. Moreover, any legislative scheme creating such a system is unreasonable, arbitrary and capricious. To the extent the City Ordinance, County Ordinance and Regulations mandate compliance under threat of criminal liability they are unlawful and should not be enforced.

COUNT THREE

(Freedom to Contract)

17. Petitioners re-allege paragraphs 1 through 16 in full.

18. The freedom to contract with whosoever one pleases, or to refrain from so contracting, is a right protected by the United States Constitution.

19. Where a private party (such as UT) provides a service, even where that service is provided under governmental authority, the only lawful penalty for choosing to not receive that service is to not receive it. It is unlawful, and a violation of constitutionally guaranteed freedoms for a criminal penalty to be imposed on one choosing to exercise the freedom not to contract with a private party.

20. To the extent the City Ordinance, County Ordinance and Regulations impose a criminal penalty for choosing not to participate in the Program, they are unlawful and should not be enforced.

COUNT FOUR

(Tax)

21. Petitioners re-allege paragraphs 1 through 20 in full.

22. The imposition of the $9.25 per vehicle "fee" for inspection of motor vehicles is the levying of a tax. The City and County can only impose criminal liability on those who do not pay a tax, not upon those who do not pay a fee for a service.

23. Pursuant to § 3-18-2, N.M.S.A. 1978, as amended, a municipality cannot impose an excise tax, and in particular an excise tax related to motor vehicles, without first obtaining the approval of the voters in that municipality.

24. The voters of the City and County have not been asked to approve the City Ordinance, the County Ordinance and the Regulations which contain an excise tax of $9.25 per vehicle per year, and which—by virtue of the contract with UT—is designed to collect approxi-

mately fifteen million dollars ($15,000,000.00) in excise taxes from the citizens of the City and the County over the next five (5) years.

25. To the extent the City Ordinance, County Ordinance and Regulations impose an excise tax, they are unlawful and should not be enforced.

COUNT FIVE

(Inspection Fee)

26. Petitioners re-allege paragraphs 1 through 25 in full.

27. If Respondents claim and prove that the $9.25 per vehicle charge assessed by the Program is not an excise tax, then it can only be an inspection fee.

28. If the charge is an inspection fee, it is unlawful for the following reasons:

A. An inspection fee can only be in an amount necessary to cover the government's cost of the inspection program. The charge in this case covers:

1. Approximately $6.18 per vehicle to UT;

2. Approximately $.90 per vehicle to the Board;

3. Approximately $.28 per vehicle for "public relations"; and,

4. The balance to a fund which will pay UT for the difference between 328,444 paid inspections and the actual number of paid inspections made at $6.18 per inspection.

Therefore, over $8.00 per inspection will go to expenses other than cost to the government, and over $3.00 per inspection will go to matters completely unrelated to any expenses of inspection. Conse-

quently, all or part of the "inspection fee" is unlawful.

B. A government entity cannot charge for an inspection fee in any different manner than the charges it makes for any other government service. Since the City and County accept payment for water, sewer and refuse removal by check, there is no valid reason to require cash payment (as opposed to payment by check) for the "inspection fee," and the cash requirement is unreasonable.

29. Likewise, if the charge is an inspection fee, that part of the City Ordinance and County Ordinance imposing criminal liability of up to ninety (90) days in jail and up to a $300.00 fine is unlawful for the following reasons:

A. Payment for inspection fees cannot be coerced by threat of criminal penalty, nor can non-payment be punished by criminal penalty; and,

B. Imposing or threatening to impose a criminal penalty for non-payment of an inspection fee is to imprison or threaten to imprison for non-payment of a debt which is unlawful.

30. Therefore, both the mandatory charge and the penalty set forth in the City Ordinance and County Ordinance are unlawful.

COUNT SIX

(Equal Protection)

31. Petitioners re-allege paragraphs 1 through 30 in full.

32. The City Ordinance, County Ordinance and Regulations deprive Petitioners of equal protection under the law in that:

A. Motor vehicles manufactured before the 1967 model year are unreasonably exempted notwithstand-

ing the fact that such vehicles contribute to hydrocarbon and carbon monoxide air pollution in the City and County;

B. Motor vehicles which are tested and fail are unreasonably exempted if they can be shown to pollute the air so badly that it would cost more than $75.00 to fix them; and,

C. Motor vehicles manufactured from the 1967 model year through the 1982 model year unreasonably, artificially and arbitrarily, and without natural basis, are not exempted and must comply as a result of which owners of such motor vehicles would bear the entire burden of paying for and complying with the City Ordinance, County Ordinance and Regulations notwithstanding the fact that such persons are not fully responsible for hydrocarbon and carbon monoxide air pollution from motor vehicle emissions.

33. To the extent the City Ordinance, County Ordinance and Regulations impose and create a denial of equal protection under the law to citizens of the City and County, they are unlawful and should not be enforced.

COUNT SEVEN

(Referendum Requirement)

34. Petitioners re-allege paragraphs 1 through 33 in full.

35. Pursuant to the County Ordinance, the terms of the County Ordinance, including the Program, cannot legally take effect until the County Ordinance has been approved by a referendum election of the voters in the County. The County Ordinance has never been presented for a referendum in the County, nor has it been approved in a referendum. Therefore, the Program cannot lawfully be commenced in the County at this time, and until such referendum is conducted.

WHEREFORE, on Counts Two through Seven Petitioners pray that a Writ of Mandamus issue to and against the Respondents herein enjoining them from enforcing the City Ordinance, County Ordinance and Regulations permanently including all phases thereof and from initiating and conducting any Program, collecting any monies, or imposing any penalty created thereby, for Petitioners' attorney's fees and costs herein, and for such other relief as the Court deems proper.

BRUCE E. PASTERNACK
Professional Corporation

by /s/ _____

BRUCE E. PASTERNACK
Attorney for Petitioners
Post Office Box 985
Albuquerque, New Mexico 87103
(505) 842-1800

by /s/ _____

MICHAEL J. CONDON
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APPENDIX C

STATE OF NEW MEXICO
IN THE DISTRICT COURT
COUNTY OF BERNALILLO

No. CV-83-00001

JOHN J. CHAPMAN, TROY H. ELLIOTT and N. ALTOM,
Petitioners,

vs.

ROBERT E. LUNA, Ph.D., ANN HYDE, ERIKA JONES, JONATHAN SAMET, Ph.D., GARY LEWIS, JAMES MONTOYA and MIKE CREUSERE, as members of the Albuquerque/Bernalillo County Air Quality Control Board, the CITY OF ALBUQUERQUE, an incorporated municipality, and the COUNTY OF BERNALILLO, a political subdivision of the State of New Mexico,

Respondents.

[Filed Jan. 14, 1983]

ORDER

THE MATTER having come before the Court on Respondents' oral Motion to Dismiss for Lack of Jurisdiction, and the Court being duly advised FINDS that the Court has jurisdiction of the subject matter and parties herein, but that this action should properly be brought as a suit for declaratory judgment.

IT IS, THEREFORE, ORDERED as follows:

1. The Petition for Writ of Mandamus shall be recast as a Complaint for Declaratory Judgment. Rather than requiring Petitioners to re-file their pleadings, the Petition heretofore filed shall be amended by interlineation as follows:

A. The caption of this case shall be amended designating Petitioners as Plaintiffs and Respondents as Defendants.

B. The heading of the former Petition shall be amended to read "Complaint for Declaratory Judgment and Other Relief."

C. Defendant County of Bernalillo shall be designated "Defendant Board of County Commissioners of the County of Bernalillo."

D. The relief requested shall be declaratory judgments for the reasons set forth in the Complaint rather than relief in mandamus.

2. Defendants have agreed to waive, and will therefore waive, the thirty (30) day period to which they would otherwise be entitled before filing their Answers. Answered will be filed by the Defendants by January 17, 1983.

3. Defendant Board of County Commissioners of Bernalillo County is granted leave to file a Motion to Dismiss on or before January 17, 1983.

4. Plaintiffs shall submit a list of witnesses and exhibits to Defendants by January 17, 1983. The witness list shall include the nature of the expected testimony of each witness.

5. Defendants shall submit a list of witnesses and exhibits to Plaintiffs by January 19, 1983. The witness list shall include the nature of the expected testimony of each witness.

6. The lists set forth at paragraphs 4 and 5 hereinabove shall be hand-delivered by all parties to the offices of opposing counsel of record on the designated date; provided that the offices of counsel of the intervenor Hamilton Test Systems shall, for the purpose of this Order, be deemed the office of the City Attorney.

7. Requests for a pre-trial conference shall be made to the Court on or before January 20, 1983.

/s/ Philip R. Ashby
District Court Judge

APPROVED:

/s/ George R. Bryan
GEORGE R. "PAT" BRYAN, III, Esq.

/s/ Bruce E. Pasternack
BRUCE E. PASTERNACK, Esq.

/s/ Joe C. Diaz
JOE C. DIAZ, Esq.

/s/ Philip R. Higdon
PHILIP R. HIGDON, Esq.

APPENDIX D

STATE OF NEW MEXICO
IN THE DISTRICT COURT
COUNTY OF BERNALILLO

No. CV-83-0001

JOHN J. CHAPMAN, TROY H. ELLIOTT and N. ALTOM,
Plaintiffs,

vs.

ROBERT E. LUNA, Ph.D., ANN HYDE, ERIKA JONES, JONATHAN SAMET, Ph.D., GARY LEWIS, JAMES MONTOYA and MIKE CREUSERE, as members of the Albuquerque/Bernalillo County Air Quality Control Board, the CITY OF ALBUQUERQUE, an incorporated municipality, and the BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, NEW MEXICO, a political subdivision of the State of New Mexico,

Defendants.

[Filed Feb. 8, 1983]

ORDER

This matter having come on to be heard before the Court on the merits and upon the motion to dismiss Count VII filed by the Defendant Board of County Commissioners of Bernalillo County and the Plaintiffs being present in person and represented by their attorney, Bruce Pasternack and the Respondents being represented by City Attorney George P. Bryan III and Assistant City Attorney Barbara Stephenson, and County Attorneys Joe Diaz and Hunter Geer and the intervenor being represented by its attorney Philip Higdon, and the Court having heretofore ruled as to all matters set forth in

Count I and Count II having been abandoned by the Plaintiffs, and the Court having reviewed the administrative record and having heard testimony of witnesses and having reviewed further documentary evidence submitted at trial and having heard arguments of counsel and having considered trial briefs submitted by counsel and having fully considered all issues herein and having heretofore filed the Court's Findings of Fact and Conclusions of Law herein and being fully advised in the premises and good cause appearing therefor,

IT IS ORDERED That the Complaint for Declaratory Judgment herein be and the same is dismissed as to Counts II through VI, inclusive with prejudice.

IT IS FURTHER ORDERED That the said motion to dismiss Count VII be and the same is hereby granted and Count VII be and the same is dismissed with prejudice.

IT IS FURTHER ORDERED That the Albuquerque/ Bernalillo County Air Quality Control Board adopt supplemental regulations regarding motor vehicle owners subject to the IM Program whose inspections were or are required during the months of January or February, 1983, and who have not heretofore had their vehicles inspected, allowing delayed inspections consistent with the continued, on-going operation of the IM Program.

IT IS FURTHER ORDERED That all parties are to assume their own costs herein.

/s/ Philip R. Ashby
PHILIP R. ASHBY
District Judge, Div. VII

APPENDIX E

SUPREME COURT OF NEW MEXICO

No. 14867

JOHN J. CHAPMAN, TROY H. ELLIOTT and N. ALTOM,
Petitioners-Appellants,

v.

ROBERT E. LUNA, Ph.D., ANN HYDE, ERIKA JONES, JONATHAN SAMET, Ph.D., GARY LEWIS, JAMES MONTOYA and MIKE CREUSERE, as members of the ALB/BERN COUNTY AIR QUALITY CONTROL BOARD, CITY OF ALBUQUERQUE and the BOARD OF COUNTY COMMISSIONERS OF BERNALILLO,
Respondents-Appellees.

March 13, 1984

Bruce E. Pasternack, Michael J. Condon, Albuquerque, for petitioners-appellants.

Gary O'Dowd, City Atty., Barbara W. Stephenson, Asst. City Atty., Albuquerque, Brown, Bain & Bingaman, Philip R. Higdon, Santa Fe, Hunter L. Geer, Joe Diaz, Albuquerque, for respondents-appellees.

OPINION

RIORDAN, Justice.

John J. Chapman, Troy H. Elliott, and N. Altom (Petitioners) filed suit in district court seeking a declaratory judgment that the operation and enforcement of the joint Albuquerque-Bernalillo County Motor Vehicle Emis-

sions Inspection Program (Program) is unlawful. After a non-jury trial, the district court dismissed Petitioners' complaint and entered an order upholding the Program. Petitioners appeal. We affirm in part and reverse in part.

The issues we address [1] are:

I. Whether state law prohibits the City from imposing an inspection fee for the Program.

II. Whether the Program violates equal protection standards by allowing exemptions not based on reasonable distinctions.

III. Whether the Program's criminal penalty provisions are invalid.

IV. Whether the ordinances' severability clauses should be given effect.

In 1979, the Albuquerque City Council (Council) and the Bernalillo County Commission (Commission) enacted ordinances which established prohibitions against excessive air pollutant emissions from motor vehicles in the city of Albuquerque and in Bernalillo County. The ordinances delegated the power to regulate the operation of a vehicle emissions inspection and maintenance program to the Albuquerque-Bernalillo County Air Quality Control Board (Board).

The Board, pursuant to its authority, adopted regulations for the establishment and operation of the Program. The Program requires that all private motor vehicles manufactured in 1968 and thereafter undergo an emissions inspection. Any vehicle failing the initial inspection may obtain a waiver from compliance with Board emission standards if the vehicle receives a prescribed

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[1] The issues we address on appeal are limited and specific. A number of other issues discussed at oral argument, but not raised in the briefs, might effect the validity of the Program. Therefore, this opinion is not to be construed as an approval of the Program.

low-emissions tune-up, or up to $75.00 worth of repairs in attempting to bring the vehicle into compliance ($75.00 Repair Provision). Upon payment of an inspection fee (Inspection Fee), the vehicle owner is given an inspection certificate (Certificate) to be displayed on the vehicle. Violation of any provision of the Program is a misdemeanor punishable by a fine of not more than $300.00 and/or not more than 90 days imprisonment for operating a registered vehicle without a Certificate.

The Program was to go into effect on December 31, 1982. Petitioners filed a petition for writ of mandamus seeking to halt operation and enforcement of the Program on statutory and constitutional grounds. The district court granted a motion for leave to intervene by Hamilton Test Systems, Inc. (Hamilton) on the basis of Hamilton's status as a party to the contract with the City of Albuquerque (City) for design and operation of the Program's test stations. On January 7, 1983, the district court ordered operation and enforcement of the Program ceased until January 17, 1983. The district court subsequently designated the action as a suit for declaratory judgment.

I. Inspection Fee.

Petitioners argue that the imposition of the Inspection Fee constitutes the charging of fees for vehicles subject to registration under the Motor Vehicle Code, NMSA 1978, Sections 66-1-1 to 8-140 (Orig.Pamp. and Cum. Supp.1983), and that Section 66-6-25 prohibits imposition of the Inspection Fee. Section 66-6-25 provides:

> No county or municipality shall require registration or charge *fees* for any vehicle subject to registration under the Motor Vehicle Code * * *. (emphasis added).

The Council, Commission, and Hamilton argue that the Inspection Fee is not a "fee" within the meaning of

Section 66-6-25. They claim that the purpose of Section 66-6-25 is to prohibit cities and counties from using vehicles as a means of raising general revenues and that the Inspection Fee is only for defraying the administrative costs of an environmental program that was specifically delegated to local authorities by the State. They also argue that the Inspection Fee is a valid exercise of local authorities' home rule power. We disagree.

This Court has the duty of construing statutes, if possible, to resolve any apparent conflict. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977). However, where a statute makes sense as written, we will not read language into it which is not there. *Burroughs v. Board of County Commissioners*, 88 N.M. 303, 540 P.2d 233 (1975). Section 66-6-25 states that no city or county shall charge *fees* for motor vehicles. It does not limit cities and counties to the imposition of only certain fees as the Council, Commission and Hamilton argue. Instead, Section 66-6-25 makes clear the legislative intent that cities and counties are prohibited from charging *any* fees for motor vehicles, regardless of the purpose of the fees.

We therefore determine that the imposition of the Inspection Fee is prohibited under Section 66-6-25.

N.M. Const. Art. X, Section 6, the municipal home rule amendment, provides in pertinent part:

> D. A municipality which adopts a charter may exercise all legislative powers and perform all functions *not expressly denied by general law* or charter. (emphasis added).

The major case discussing "municipal home rule" in New Mexico is *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974). The issue in *Apodaca* was whether the City of Albuquerque could increase water and sewer rates and apply the increased revenue to municipal functions other than those set out by statute. The statutes at that time

specifically allowed the City to use water and sewer revenues for "maintaining, enlarging, extending, constructing and repairing'" water and sewer systems. *Id.* at 519, 525 P.2d at 880 (quoting NMSA 1953, Repl.Vol. 3, (1968)), § 14-26-4 and § 14-25-2(A). The statutes did not authorize the revenue to be used for any other purpose nor did it forbid its use for other municipal functions. In ruling in favor of the City, this Court stated:

> The [Municipal Home Rule Amendment] and art. I of the City Charter enable the City, as a municipal corporation, to exercise all legislative powers and to perform all functions *not expressly denied by* the City Charter or *general state law.*

Apodaca, 86 N.M. at 520, 525 P.2d at 880 (emphasis added). This Court defined "general law" as "a law that applies generally throughout the state, or is of statewide concern * * *." *Apodaca,* 86 N.M. at 521, 525 P.2d at 881. This Court also determined that "not expressly denied" means that "some express statement of the authority or power denied must be contained in such general law in order to be applicable * * * or otherwise no limitation exists." *Apodaca,* 86 N.M. at 521-522, 525 P.2d at 881-882.

The law at issue here, Section 66-6-25, applies generally throughout the state and is of statewide concern because the people of the state have an interest in maintaining a uniform system of conditions and charges for operating motor vehicles in the state. Section 66-6-25 is therefore a "general law", and it clearly and expressly states that cities and municipalities are prohibited from charging fees for motor vehicles subject to registration.

Therefore, we also determine that the imposition of the Inspection Fee is not a valid exercise of local authorities' home rule power.

II. Equal Protection.

Petitioners argue that the Program violates equal protection standards because: (1) it exempts from coverage vehicles manufactured before 1968 and all vehicles less than one year old; and (2) the $75.00 Repair Provision is discriminatory in its application.

We have previously determined that:

> Equal protection does not prohibit classification for legislative purposes, provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does and those to whom it does not apply, and that it is so framed as to embrace equally all who may be in like circumstances and situations.

Gruschus v. Bureau of Revenue, 74 N.M. 775, 778, 399 P.2d 105, 107 (1965) (citations omitted). Furthermore, a presumption exists that legislative acts of a municipality are legal and valid, and their provisions are presumed constitutional. *City of Albuquerque v. Jones*, 87 N.M. 486, 535 P.2d 1337 (1975). Since the Program is "legislative in nature", the presumption extends to it. *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 637-638, 459 P.2d 159, 163-164 (Ct.App.1969).

Petitioners first argue that there is no significant difference between 1967 model vehicles and 1968 model vehicles which justifies exempting 1967 model vehicles from the Program. They claim that the fact that pre-1968 motor vehicles were not required by the EPA to have anti-pollution devices installed does not provide a rational basis for the exemption. We disagree.

The record indicates that the pre-1968 model vehicle exemption was decided upon for several reasons. First, the Environmental Protection Agency (EPA) did not require pre-1968 model vehicles to have pollution control devices. Second, EPA recommends that pre-1968 model

vehicles and vehicles more than 15 years old be exempted from emissions inspection maintenance programs that grant age exemptions. The record indicates that such exemptions are granted in Connecticut, Missouri, and Colorado, while other programs exempt an even larger group of vehicles. Third, mechanical differences render pre-1968 vehicles more difficult to test for emission levels than vehicles manufactured in 1968 and thereafter. In addition, the State of New Mexico, pursuant to Section 66-3-844(C), requires that all vehicles manufactured in 1968 and thereafter be "maintained in good working order with the factory-installed devices and equipment * * * designed to prevent, reduce or control exhaust emissions or air pollution." Testimony at trial indicated that pre-1968 model vehicles cannot be measured by state-of-the-art testing equipment and that it is difficult to obtain parts in repairing and tuning-up pre-1968 model vehicles. Testimony at trial also indicated that it would be impossible to bring pre-1968 model vehicles within applicable emission standards without unfairly applying these standards.

After reviewing the record, we determine that the pre-1968 model vehicle exemption does not violate equal protection standards because there are significant differences between 1967 and 1968 model vehicles which provide a rational basis for exempting pre-1968 model vehicles.

Petitioners also argue that the $75.00 Repair Provision is discriminatory in its application. The Program establishes a maximum required low emission-related repair cost of $75.00 for vehicles to qualify for a certificate of waiver. However, the $75.00 Repair Provision does not apply to the cost of replacing or repairing anti-pollution equipment that has been removed or rendered inoperable by any person. Petitioners claim that by requiring the latter group of vehicles to come into compliance, regardless of cost, this exemption denies equal protection to those persons whose anti-pollution devices have

been removed or rendered inoperable through no fault of their own.

It is rational and proper to single out persons who have intentionally removed or rendered inoperable anti-pollution devices. However, the Program allows vehicles whose anti-pollution devices that do not function properly or have been rendered inoperable or removed by another means to undergo no more than $75.00 worth of repairs even if those repairs do not bring the vehicle into compliance. The Federal Government has required all vehicles manufactured in a current year to meet certain emission standards. 42 U.S.C. § 7521(a) (Supp.V.1981). It is a violation of Federal law to remove or render inoperable the manufacturer's anti-pollution devices. 42 U.S.C. § 7522(a)(3)(A) (Supp.V.1981). In our opinion, it is not unfair or unreasonable to single out this group of violators and require them to spend whatever it takes to bring their vehicles into compliance. Nor is it unreasonable to exempt new cars from testing since Federal law requires that they meet the federal standards when manufactured. 42 U.S.C. § 7521(a) (Supp.V.1981).

This does not, however, address the real issue involving the $75.00 exemption. The Program, through testing, identifies vehicles that pollute. However, by paying up to $75.00 to a private individual, a mechanic, it allows the violators who are in effect "certified" as the worst pollutors to continue to operate their vehicles. This is not rational. It does not have any reasonable basis, nor is it designed to further the objectives of cleaning up the air. Allowing cars that fail the test to undergo no more than $75.00 worth of repairs, violates the Program's stated purpose which is to protect the health and welfare of the citizenry by reducing pollutant levels. If the Program is to operate fairly and pursue its stated purpose, then it is essential that all vehicles tested and proved to be operating below the Program's emission standards be required to undergo sufficient repairs to bring them into compliance regardless of the expense involved.

We therefore determine that the $75.00 Repair Provision is invalid.

III. *Criminal Penalties.*

Petitioners also argue that the Program is invalid because it imposes a criminal penalty in violation of state law. Article X, Section 6 provides in pertinent part:

> E. The purpose of this section is to provide for maximum local self-government. *A liberal construction shall be given* to the powers of municipalities. (emphasis added).

In reviewing city legislation, we consider that:

> [A] home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act. *To adopt any other interpretation in New Mexico would make the home rule amendment meaningless.*

Apodaca, 86 N.M. at 521, 525 P.2d at 881 (emphasis added).

In determining the authority of the Council to enact its ordinance, including its penalties, we must look at the applicable legislative enactment, the state Air Quality Control Act, NMSA 1978, Section 74-2-1 to Section 74-2-17 (Repl.Pamp.1983). Section 74-2-3(A) grants the Environmental Improvement board enforcement authority except in "municipalities within A class counties or A class counties which have elected, by adopting the appropriate ordinance, to assume jurisdiction for the administration and enforcement of the Air Quality Control Act." [2]

The Act specifically provides in Section 74-2-4(A) that:

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[2] An "A class county" is defined by NMSA 1978, Section 4-44-1 (Repl.Pamp. 1980) as counties "having a final, full assessed valuation of over seventy-five million dollars ($75,000,000) and having a population of one hundred thousand persons or more as determined by the last official United States census[.]"

> A class counties and any municipality wthin an A class county which provides for air quality control *shall*, by ordinance, provide for the local administration and enforcement of the Air Quality Control Act * * *. The provision of any such ordinance *shall be consistent* with the *substantive provisions* of the Air Quality Control Act * * *. (emphasis added).

The enforcement under the Act is civil in nature with two exceptions which are contained in Section 74-2-14. Section 74-2-14 provides in pertinent part:

> A. [A]ny A class county or municipality within an A class county *may* prescribe penalties for violations of an ordinance:
>
> * * * *
>
> (2) prohibiting the removal of motor vehicle emission control devices installed as required by law and *requiring the maintenance of [motor vehicle emission control] devices in operating condition.*
>
> B. [I]t *shall* be a petty misdemeanor to violate any regulation of the environmental improvement board:
>
> * * * *
>
> (2) prohibiting the removal of motor vehicle emission control devices installed as required by law or *requiring the maintenance of [motor vehicle emission control] devices in operating condition.* (emphasis added).

The question becomes whether the Act, which under *Apodaca* is a "general state law", in any way "expressly denies" the City the authority to provide for criminal sanctions.

Our reading of *Apodaca* leads to the inescapable conclusion that not only is there no express denial of that authority, but the Legislature specifically authorized it in Section 74-2-14. The fact that the Legislature provided

additional civil penalties and prescribed the penalty for violation of board *regulations* does not eliminate that authority.

We therefore determine that the criminal penalty provisions of the Program are not invalid.

IV. *Severability Clause.*

Having determined that at least two provisions of the ordinances are invalid, we address the effect of our decision. The ordinances have the following severability clause:

> If any section, subsection, sentence, clause, word or phrase of this ordinance is for any reason held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

We have previously addressed the effect of the inclusion of a severability clause in an ordinance. In *Schwartz v. Town of Gallup*, 22 N.M. 521, 529, 165 P. 345, 348 (1917) we stated:

> A part of the law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other without impairing the force and effect of the portion which remains, and where the legislative purpose as expressed in such valid portion can be accomplished and given effect, independently of the void provisions, and where if the entire act is taken into consideration it cannot be said that the enacting power would not have passed the portion retained had it known that the void provisions must fall. (citation omitted).

We have determined that a severability clause raises a presumption that the legislating body would have enacted the rest of the ordinance without the void section. *Barber's Super Markets v. City of Grants*, 80 N.M. 533, 458

P.2d 785 (1969). The severability clause in this case is emphatic in its statement that the ordinances would have been enacted even if the invalid provisions were not included.

We therefore determine that the invalid provisions do not invalidate the ordinances.

V. *Conclusion.*

We are aware of the tremendous problem the government faces in trying to alleviate air pollution, some of which can be attributed to motor vehicle emissions. We are also aware of the difficulty involved in developing a program that meets the objective of clean air while complying with statutory and constitutional limitations. However, it is not for the courts to develop such a program, but rather it is the responsibility of the Legislature, the City, and the County to do so.

We conclude that the Program may be continued without imposition of a fee and without a repair cap for vehicles that do not come into compliance; otherwise, the Council and Commission will have to discontinue the Program.

IT IS SO ORDERED.

SOSA, Senior Justice, specially concurring.

FEDERICI, C.J., and STOWERS and WALTERS, JJ., concurring in part and dissenting in part.

SOSA, Senior Justice, specially concurring.

I concur with the four points in this opinion. However, under Point II, I would address the equal protection issue that was raised in oral argument, but not presented in the briefs. Specifically, the question of whether the program should be applied to all state residents or merely to residents of Bernalillo County is one that I believe merits attention. In *Wylie Brothers Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board*, 80 N.M. 633, 459 P.2d 159 (Ct.App.1969), an opinion dealing with air pollution regulations, Justice Oman anticipated the problems we would encounter if regulations and controls were only local and not statewide. There he prophetically stated:

> To draft, and particularly to enforce, regulations for the control of emissions from these highly mobile vehicles on a single county-wide basis, would be extremely difficult. *The making of regulations relative to the control of emissions from these vehicles belongs to an agency with far greater geographic jurisdiction than that of a single county.* The control thereof should be left very largely, if not entirely, to the state and federal governments. (emphasis added).

Id. at 644, 459 P.2d at 170.

This is an issue of significant importance and general public nature affecting the interest of the state at large and, as such, this Court may consider it. *DesGeorges v. Grainger*, 76 N.M. 52, 412 P.2d (1966). All citizens, not only those in Bernalillo County, should be afforded protection against air pollutants. A statewide program against vehicular pollution would equally regulate all vehicles in the state and remove the inequities in the program. As presently enforced, the pollution control pro-

gram subjects only residents of Bernalillo County to the Inspection Program. The greater Albuquerque metropolitan area covers other counties. Citizens of these outside counties use Bernalillo County roads daily yet are not subject to the Inspection Program. This appears to me to be an arbitrary, unfair and selective imposition of a regulation on Bernalillo County residents.

It is my reading of Section 66-6-25, NMSA 1978, of the Motor Vehicle Code, that the statute directly prohibits the charging of any fees in connection with the operation of motor vehicles, no matter how noble the purpose. As a matter of public policy and with deep concern for the health and welfare of New Mexico citizens, I agree with the need for an effective program to prevent increased air pollution. However, it is not within the province of the judiciary to change Section 66-6-25. The legislature must remedy this defect.

FEDERICI, Chief Justice and WALTERS, Justice (concurring in part, dissenting in part).

We concur in Justice Riordan's disposition of Points II, III, and IV. We disagree with the decision regarding Point I since Section 66-6-25, NMSA 1978, refers to proscription of fees for "registration" of vehicles by a county or municipality, and not to fees for other purposes. We therefore respectfully dissent on that issue.

STOWERS, Justice (concurring in part, dissenting in part).

I concur in the disposition of points I, II, and IV of the opinion. I dissent as to point III, in that the imposition of criminal penalties exceeds the legislative authority which is limited to civil sanctions and fines.

APPENDIX F

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CV-83-00001

JOHN J. CHAPMAN, *et al.*,
Plaintiffs,

vs.

ROBERT E. LUNA, *et al.*,
Defendants,

HAMILTON TEST SYSTEMS, INC.,
Intervenor.

[Filed April 4, 1984]

MOTION FOR ATTORNEY'S FEES

Plaintiffs move the Court pursuant to Local Rule 25 and 42 U.S.C. §§ 1983 and 1988 for its Order awarding Plaintiffs their attorney's fees and costs herein and apportioning said award as the Court deems proper among the Defendants and Intervenor.

As grounds for this Motion, Plaintiffs would show the Court that they have reasonably incurred substantial attorney's fees and costs in this case, that they were the prevailing parties herein, that the Opinion of the New Mexico Supreme Court in which they were the prevailing parties was based, in part, on grounds set

forth in the U.S. Constitution and compensable thereby under the Civil Rights Act, §§ 1983 and 1988, and that as a result of the foregoing they are entitled to recover their attorney's fees and costs from the Defendants and Intervenor apportioned as the Court deems proper. As further grounds for this Motion, Plaintiffs would show the Court that they are prepared to demonstrate the compensable nature of their attorney's fees and costs pursuant to the criteria recognized in 42 U.S.C. § 1988 and the cases decided pursuant thereto, and request that the Court have an evidentiary hearing for that purpose.

BRUCE E. PASTERNACK, P.C.

By /s/ Bruce E. Pasternack
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I hereby certify that a copy of the above Motion has been mailed to all counsel of record this 4th day of April, 1984.

/s/ Bruce E. Pasternack
BRUCE E. PASTERNACK

APPENDIX G

SECOND JUDICIAL DISTRICT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CV-83-001

JOHN J. CHAPMAN, *et al.*,
Plaintiffs,

vs.

ROBERT E. LUNA, Ph.D., *et al.*,
Defendants.

HAMILTON TEST SYSTEMS, INC.,
Intervenor.

[Filed July 2, 1984]

ORDER

This cause having been remanded to this Court by the New Mexico Supreme Court for such proceedings herein as may be proper, consistent and in conformity with the Opinion and Judgment handed down by the New Mexico Supreme Court on March 13, 1984, such Opinion and Judgment having affirmed in part and reversed in part the Order of this Court filed February 8, 1983, and the New Mexico Supreme Court having mandated that this Court enter judgment in conformity with its Opinion and Mandate, and the Plaintiffs having filed a Motion for the allowance of costs, including attorneys fees, and the Court having considered such Motion and being fully

advised in the premise and the Court having heretofore filed Findings of Fact and Conclusion of Law with regard to the attorneys fees,

IT IS ORDERED that Declaratory Judgment herein be and the same is granted as to the invalidity of the $9.25 inspection fee in Count V of Plaintiffs' Complaint and as to the invalidity of the $75.00 repair provisions in Count VI of Plaintiffs' Complaint, and the remainder of Plaintiffs' Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that the Plaintiffs are awarded costs in the sum of $1,953.95.

IT IS FURTHER ORDERED that the motion for the award of attorneys fees, as costs, is hereby denied.

/s/ Philip R. Ashby
PHILIP R. ASHBY
District Judge, Div. VII

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN J. CHAPMAN, *et al.*,
Petitioners,

v.

ROBERT E. LUNA, PH.D., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the New Mexico Supreme Court

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-389

JOHN J. CHAPMAN, *et al.*,
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Respondents.

On Petition for Writ of Certiorari to the New Mexico Supreme Court

---

PETITIONERS' REPLY BRIEF

POINT 1

THIS COURT SHOULD DISREGARD RESPONDENTS' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI BECAUSE IT IMPERMISSIBLY ARGUES THE MERITS OF THE CASE

Rule 22 of the Rules governing procedure before this Court provides that a Respondent may file "an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court". Instead of confining their Brief in Opposition to the sole permissible issue—whether this Court should grant certiorari—Respondents have improperly filed a Brief on the merits, prematurely arguing the substantive law. Respondents'

Brief might be proper under Rule 34, after entry of an order granting certiorari, but it is inappropriate at this preliminary stage in the proceedings. The only issue now before this Court is whether to review the decision below. This Court should therefore disregard Respondents' Brief in Opposition which addresses the outcome of review.

POINT 2

EVEN IF IT WERE PERMISSIBLE TO ARGUE THE MERITS OF THE CASE, THE MATTERS RAISED BY RESPONDENTS HAVE ALL BEEN HERETOFORE DISPOSITIVELY DETERMINED BY THIS COURT IN FAVOR OF THE POSITION ADVOCATED BY PETITIONERS

While Petitioners discuss the merits of the matter with great reluctance, the Respondents' Brief in Opposition requires a brief review of the cases this Court has already decided.

Respondents allege that Petitioners did not allege or prove a specific "injury" or seek "any personal relief, in the form of damages or equitable relief, against Respondents" or allege any personal deprivation of rights. Brief in Opposition, pp. 5-7. These defenses to the award of attorney's fees have been considered, and specifically rejected, by this Court. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Hensley* holds that if the suit provides "some benefit to plaintiffs or some vindication of their rights", fees should be awarded. In the instant case, the benefit sought was the termination of a program considered unlawful by Petitioners and the declaration that the ordinance promulgating that program was unlawful. The New Mexico Supreme Court declared the ordinance unlawful, the City repealed it, and the program has been terminated. To say that Petitioners obtained "some benefit" that they sought would be an understatement.

Insofar as Respondents allege that Petitioners needed to seek damages in order to be awarded fees (Brief in Opposition at p. 5), this Court has already rejected Respondents' argument in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Monell* stands for the proposition that litigants who bring a successful equal protection challenge to a municipal ordinance and obtain a declaratory judgment so holding *are* entitled to attorney's fees. Of accord, *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1967).

Insofar as Respondents claim that attorney's fees should be denied because § 1983 was not specifically pled (Brief in Opposition at p. 6), that argument has been specifically rejected by this Court and others. *Maine v. Thiboutot*, 488 U.S. 1 (1980); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); and *Founding Church of Scientology of Washington D.C. Inc. v. Director, Federal Bureau of Investigation*, 459 F.Supp. 748 (D.D.C. 1978). Insofar as Respondents challenge whether Petitioners were "prevailing parties", that argument was specifically rejected by this Court in *Hensley, supra*, and *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982). Insofar as Respondents claim that the Motion for Attorney's Fees was untimely, that argument was specifically rejected by this Court in *White v. New Hampshire Department of Employment Security, supra.*

POINT 3

THE CASES CITED BY RESPONDENTS ARE INAPPOSITE

Respondents rely on *Gardner v. Luckey*, 423 U.S. 841 (1975), for the proposition that the Complaint "must allege that the plaintiff himself was injured by the conduct of the public officials". Brief in Opposition at 6. The plaintiffs in *Gardner* alleged that the State Public Defender's offices failed to meet constitutional standards

in the representation of indigents. The Fifth Circuit upheld the dismissal of the Complaint because no plaintiff alleged that he was among the group of people injured by the conduct of the Public Defenders and, even had there been such an allegation, the appropriate remedy would have been by way of habeas corpus. In the present case, the Petitioners, as residents of Bernalillo County, are clearly within the class of people that would have been subject to the program and would therefore have suffered a deprivation of their right to equal protection had the program been implemented as originally created. Additionally, Petitioners had no alternate means of relief, and the New Mexico Supreme Court did find the matter within its jurisdiction and granted the relief requested.

Estes v. Tuscaloosa County, 696 F.2d 898 (11th Cir. 1983), and *Webb v. Board of Education*, 105 S.Ct. 1923 (1985), cited by Respondents are similarly inapplicable to the present case. *Estes* held that a plaintiff who could not establish a deprivation of a constitutionally protected right was not entitled to a § 1983 award. Petitioners, however, have already prevailed on a claim of deprivation of equal protection. *Webb* held that attorney's fees may not be awarded in a § 1983 action for work done in a prior administrative hearing. Petitioners, however, seek attorney's fees only for work done in the judicial proceedings in this case.

CONCLUSION

The issue raised by the Petition for Writ of Certiorari is whether a State can declare its constitutional equal protection provision identical to the correlative federal provision, yet thereafter sever from that declaration the matter of entitlement to attorney's fees for the vindication of an equal protection deprivation. Respondents have utterly failed to address that issue. There is a good reason for their failure; the Opinion of the New Mexico

Supreme Court which makes such a declaration is unprecedented and illogical. It cannot be supported by case law or reason. However, if allowed to stand, the Opinion of the New Mexico Supreme Court will serve as precedent for a pernicious erosion of the equal protection clause in direct derogation of cases decided in this Court's last term which appear to stand for a growing equal protection clause. *City of Cleburne v. Cleburne Living Center*, 53 U.S.L.W. 5022 (1985); *Metropolitan Life Insurance Co. v. Ward*, 53 U.S.L.W. 5399 (1985); and *Williams v. Vermont*, 53 U.S.L.W. 4659 (1985).

To avoid such a conflict, which would ultimately increase the burden on this Court and the entire federal judiciary, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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